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No. 79-1631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DEMOCRATIC PARTY OF THE UNITED STATES OF AMERICA and DEMOCRATIC NATIONAL COMMITTEE,
Appellants,

v.

WISCONSIN EX REL. BRONSON C. LA FOLLETTE and DEMOCRATIC PARTY OF WISCONSIN,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

Whether, in light of the First and Fourteenth Amendments to the U.S. Constitution, *Cousins v. Wigoda*, 419 U.S. 477 (1975), and other decisions of this Court, the State of Wisconsin's primary election statutes may constitutionally (1) force the National Democratic Party to permit Republicans and other non-Democrats to participate in the Party's presidential candidate selection processes; and (2) prohibit the Party from enforcing its rules for determining the qualifications of delegates to its National Convention.

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BRIEF FOR APPELLANTS

Under its rules the National Democratic Party allows only publicly declared Democrats to participate in its processes for selecting the Party's presidential candidate. In contrast, Wisconsin's open primary statute permits Republicans, independents, and other non-Democrats to vote in the Democratic presidential primary without regard to party affiliation. In the judgment on appeal, the Wisconsin Supreme Court ruled that the Democratic Party and its Convention could not refuse to seat the delegates from Wisconsin on the grounds that, as required by the

state's law, the results of the open primary controlled their votes for the Party's nominee.

The Wisconsin court's order violates the First and Fourteenth Amendments to the United States Constitution. It prohibits the Democratic Party from allowing only Democrats to participate in its candidate selection processes. It infringes on the rights of the Party and its adherents to establish and enforce qualifications for the delegates to its National Conventions.

OPINION BELOW

The opinion of the Wisconsin court, which is set forth in Appendix A of Appellants' Jurisdictional Statement (hereinafter cited as "J.S. App. A"), is reported at 93 Wis. 2d 473, 287 N.W.2d 519 (1980). It is the only opinion below, because the State of Wisconsin initiated this case as an original action before the Supreme Court of Wisconsin.

JURISDICTION

The Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2). The Supreme Court of Wisconsin entered its judgment upholding the constitutionality of the open primary law on January 19, 1980. The National Democratic Party filed a Notice of Appeal in the Supreme Court of Wisconsin on March 13, 1980. J.S. App. A at 68a. This appeal was docketed in this Court within 90 days from the final judgment of the Wisconsin court. This Court noted probable jurisdiction on July 2, 1980. *Democratic Party of the United States et. al. v. Wisconsin ex rel. La Follette*, 100 S.Ct. 3054 (1980).[1]

[1] On the same day the Court stayed the judgment of the Wisconsin Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The First and Fourteenth Amendments to the United States Constitution and relevant portions of the Delegate Selection Rules for the 1980 Democratic National Convention are set forth in Appendix B of Appellants' Jurisdictional Statement. The applicable Wisconsin primary election statutes, Wis. Stat. §§ 5.37(4); 5.60(8)(intro.),(c),(d); 8.12 (1977), are set forth in Appendix A of Appellants' Jurisdictional Statement, as an Appendix to the Wisconsin Supreme Court's opinion.

STATEMENT OF THE CASE

Rule 2A of the Democratic Party's Delegate Selection Rules limits participation in the delegate selection process to Democratic voters who are willing to affiliate publicly with the Party.[2] Under the Party's rules the delegate selection process includes any procedure by which delegates are bound to vote for the nomination of particular candidates. Democratic National Committee, Delegate Selection Rules for the 1980 Democratic National Convention, Rule 12(B), (D) (June 9, 1978) (hereinafter cited as "Delegate Selection Rules for the 1980 Democratic National Convention"), Appellant's Jurisdictional Statement, Appendix B (hereinafter cited as "J.S. App. B") at 70a-71a. In contrast, the Wisconsin open primary law allows non-Democrats—including Republicans, independents, and others—to vote in the Democratic primary without regard to party affiliation and without requiring

[2] Rule 2A provides in part:

> Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded.

a public declaration of party preference. The State's statute also provides that the open primary results must control the nominee preference votes of the delegates from Wisconsin to the national nominating convention. Wis. Stat. § 8.12(3)(b), (3)(c)5., J.S. App. A at 58a-59a. In the decision on appeal, the Wisconsin Supreme Court declared that the Party's National Convention may not disqualify delegates because the open primary results control their votes for the Party's nominee. J.S. App. A at 42a. The Wisconsin court's judgment and the state statute thus would preclude the Party from enforcing its rule on who may participate in selecting the Democratic presidential candidate.

A. The Party's Rule: Its Evolution and Purpose

1. *The 1968 Convention and the genesis of the rule*

Rule 2A is an integral part of the National Party's twelve-year effort to reform its processes for choosing presidential candidates. In the wake of the disruption and violence at the 1968 Democratic National Convention, the National Party determined to study and reform its nominating procedures and party structure. The Convention, the highest authority within the Democratic Party, directed the Democratic National Committee (the "DNC") to establish the Commission on Party Structure and Delegate Selection (the "McGovern/Fraser Commission").[3] The Commission's report, issued in 1970,[4] identi-

[3] The Commission had an important precursor, the Special Equal Rights Committee, created by the 1964 Convention. The Commission was responsible for developing and policing rules forbidding racial discrimination at the 1968 Convention. Among its guidelines was a request that state parties send delegations broadly representative of the Democrats of that state.

[4] Commission on Party Structure and Delegate Selection, *Mandate for Reform: A Report of the Commission on Party*

(*footnote continues*)

fied the problem that became the major target of the Party's reform efforts: the Party's Convention had been unrepresentative of rank and file Democrats as to both demographics (blacks, other minority groups, women, and youth) and candidate preference. The perception of a party impervious to its rank and file, the Commission said, threatened the Party's future. *Mandate for Reform* [Record (hereinafter cited as "Rec.") at 200] at 9. The challenge was "to find methods which would guarantee every American *who claims a stake in the Democratic Party* the opportunity to make his judgment felt in the presidential nominating process." *Id.* at 8 (emphasis added).

The McGovern/Fraser Commission adopted guidelines to eliminate state party practices that (1) limited the access of Democratic rank and file to the candidate selection processes and (2) would dilute the influence of each Democrat taking advantage of the expanded opportunities to participate. *Id.* at 12. For example, the delegates ultimately chosen and their apportionment to particular candidates had to reflect fairly the candidate preferences of Democrats participating at all levels of the process. *Id.* at 44.[5]

(*footnote continued*)

Structure and Delegate Selection to the Democratic National Committee (April, 1970) (hereinafter cited as "*Mandate for Reform*") [Rec. 200].

[5] Other measures the Commission recommended included: (a) abolishing the unit rule at any stage of the delegate selection process so that a majority of a meeting or delegation no longer could bind a dissenting minority to vote in accordance with the wishes of the majority; (b) requiring adequate public notice of times and places of meetings related to the delegate selection process; and (c) requiring information on ballots as to the presidential preference of candidates or slates of delegates. *Id.* at 44-46.

While seeking to open the Party's nominating processes to all persons who wished to be Democrats, the Commission was concerned that "a full opportunity for all Democrats to participate is diluted if members of other political parties are allowed to participate in the selection of delegates to the Democratic National Convention." *Id.* at 47. It urged state parties to limit participation in delegate selection processes to Democrats. Limiting participation to Democratic voters was thus an integral feature of the effort to open the nominating processes to fully effective participation by rank and file Democrats.

2. ***Further development of the rule: The Mikulski Commission, the Party's Charter, and the 1976 Delegate Selection Rules***

In 1972 the Democratic National Convention created a new commission to review and revise the guidelines it had used. The Commission on Delegate Selection and Party Structure (the "Mikulski Commission") continued the effort to ensure that the influences of all Democrats were fully felt in the delegate selection and nominating processes. *See* Commission on Delegate Selection and Party Structure, *Democrats All: A Report of the Commission on Delegate Selection and Party Structure* (December 6, 1973) (report to Democratic National Committee), Joint Appendix (hereinafter cited as "J. App.") at 30.[6] As part of that effort, the Commission tried to strengthen the rules that would allow only Democrats to participate in the Party's candidate selection processes. Moving beyond the hortatory language of the McGovern/Fraser Commission, the Mikulski Commission proposed rules that directed state parties to take steps to restrict participation in the delegate selection process to Democratic voters only. *Id.*

[6] For example, it retained rules requiring that the delegates fairly reflect the expressed preferences of Democratic voters participating in the selection process. *Id.* at 2, J. App. at 31-32.

at 2, 15. The DNC incorporated these recommendations into the Delegate Selection Rules for the 1976 Convention, Democratic National Committee, Delegate Selection Rules for the 1976 Democratic National Convention (March 1, 1975) (hereinafter cited as "Delegate Selection Rules for the 1976 Democratic National Convention"). J. App. at 36.

In 1974 the National Party adopted its Charter and By-Laws. Consistent with the themes of the Party's reform efforts, the Charter establishes the following qualifications for future delegates to the Party's national conventions:

> The National Convention shall be composed of delegates who are chosen through processes which (i) assure all Democratic voters full, timely and equal opportunity to participate and include affirmative action toward that end, (ii) assure that delegations fairly reflect the division of preferences expressed by those who participate in the presidential nominating process, . . . [and] (v) restrict participation to Democrats only. . . .

Democratic National Committee, Charter of the Democratic Party of the United States, Article Two, Section 4. Exhibit 1 [Rec. 199] at 2-3.

In 1976, Rule 2A of the Delegate Selection Rules took its present form. Consistent with the Charter, it restricted participation in the delegate selection process in primaries or caucuses to "Democratic voters only who publicly declare their party preference and have that preference publicly recorded." Delegate Selection Rules for the 1976 Democratic National Convention, Rule 2A, J. App. at 36. Although the text of the original Rule 2A was the same as the 1980 rule, a state party could obtain an exemption from it. Rule 20 authorized exemptions from any rule that was inconsistent with state law, where the state party was

unable to secure changes in the law. See discussion of Rule 20 *infra* at 9 n.9.

3. *The Winograd Commission and the 1980 Rule*

In late 1975 the Party established another commission to study its nominating processes for 1980 and after, the Commission on Presidential Nomination and Party Structure (the "Winograd Commission"). In its report, *Openness, Participation and Party Building: Reforms for a Stronger Democratic Party* (February 17, 1978) (hereinafter cited as "*Openness, Participation and Party Building*"), J. App. at 37, the Winograd Commission specifically focused attention on the question "[w]ho should participate in selecting the presidential nominee of the Party?" *Id.* at 7, J. App. at 46.

The Winograd Commission identified problems related to open or crossover primaries as particular weaknesses in the rules.[7] Its focus on the dilution of each Democrat's influence caused by crossovers arose, in part, from a study of voting in Wisconsin's open primary. This study, discussed *infra* at 30-31, found that in Wisconsin Democratic primaries from 1964 through 1972: crossovers made up between 26% and 34% of the participants, their voting patterns were significantly different from those of primary voters who identified themselves as Democrats, and they had a significant impact on the composition of the delegation from Wisconsin.[8]

Based on such studies and the unsatisfactory experience of prior years, the Winograd Commission recom-

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[7] As used in this Brief, an open or crossover primary is a primary which permits nonadherents of a party to vote in that party's primary. The nonadherents "crossing over" may be adherents of other parties or they may be independents.

[8] Adamany, *Cross-over Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 538-39 (1976).

mended further strengthening of the Party's rules against crossover voting. *Openness, Participation and Party Building* at 68, J. App. at 71. It proposed revising Rule 2 because continued crossover voting "could result in a convention delegation which did not fairly reflect the division of preferences among Democratic identifiers in the electorate." *Id.* It retained the text of Rule 2A, quoted *supra* at 3 n.2, but added Rule 2B which prohibited exemptions from the rule. *Id.* at 69, J. App. at 73; Delegate Selection Rules for the 1980 Democratic National Convention Rule 2B, J.S. App. B at 69a. Rule 2A was the only rule from which the 1980 rules permitted no exemptions.[9]

B. The Wisconsin Open Primary Law and the Proceedings Below

As noted, the Wisconsin primary election statute allows any voter to vote in the Democratic primary without regard to party affiliation. J.S. App. A at 2a, 23a-24a. At the open primary each voter is given the ballots of all parties. Wis. Stat. § 5.60(8), J.S. App. A at 47a. While each voter may vote on only one ballot, the voter need not publicly indicate which party's ballot he marked. *Id.* Republicans, independents and other non-Democrats are allowed to vote in the Democratic primary and, hence, to

[9] Rule 20 permits exemptions from other rules where state parties are unable to comply with the Delegate Selection Rules because the rules are in conflict with existing state law. Under Rule 20 state parties must take "provable positive steps to achieve legislative changes to bring the state law into compliance with the provisions of these rules." If a state party takes such provable positive steps but is unable to obtain the necessary legislative changes, the state party may be eligible for a Rule 20 exemption. In 1976, at the eleventh hour, the Wisconsin State Party obtained such an exemption from the 1976 version of Rule 2A.

influence the selection of the Party's presidential nominee. Although the delegates to the Democratic National Convention are chosen later at caucuses attended by Democrats, the statute requires that the votes of these delegates must be committed to presidential candidates in proportion to the votes cast in the open primary. Wis. Stat. § 8.12(3)(b); Stipulations 18, 19, J. App. at 26-27.

On May 11, 1979, the Democratic Party of Wisconsin transmitted the Wisconsin Delegate Selection Plan of 1980 to the Party's Compliance Review Commission (the "CRC").[10] Stipulation 13, J. App. at 25. The plan provided that delegates shall be allotted to candidates in proportion to the votes cast for the candidates in the State's "open" primary. The CRC found that this method violated Rule 2A and, on July 19, 1979, advised the Wisconsin Party that its Plan violated the Rules and the Call to the 1980 Convention.[11] Stipulations 14, 15, J. App. at 25. Compliance with Rule 2A was a condition to participation at the National Convention. Stipulation 11, J. App. at 25.

On August 29, 1979, the State of Wisconsin asked the Wisconsin Supreme Court for leave to commence an original action to enforce its primary law against the Democratic Party. The State sought declaratory and injunctive relief, asking the court in part (1) to enjoin the National and Wisconsin Parties from implementing an alternate delegate selection system limited to publicly declared Democrats, and (2) to enjoin the National Party

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[10] The CRC, which is a special party commission established under the Rules, reviews delegate selection plans submitted by state parties and approves or requires changes in them. Stipulation 12, J. App. at 25.

[11] The Call formally establishes the date of the Convention, the qualifications for delegates, the Convention's procedures, and other rules essential to the conduct of the Convention. Stipulation 10, J. App. at 24.

from refusing to seat Wisconsin delegates at the Convention solely because they were bound by the results of the State's open primary.

After briefing and oral argument, the Wisconsin Supreme Court declared that: the Wisconsin primary election statutes are constitutional and binding on the National Party; the vote in the primary shall determine the apportionment among candidates of delegates to the Democratic National Convention from Wisconsin; and the National Party shall not disqualify any delegates solely because they are bound by the primary results. J.S. App. A at 42a.

The Wisconsin court assumed that the National Party has a constitutionally protected interest in ensuring that only Democrats participate in the selection of the Democratic candidate. It reasoned, however, that the primary election statute did not substantially burden that interest. In the court's view, the method the Party had chosen to reach its objective—requiring public affiliation—was not "a necessary and effective way to prevent Republicans, adherents of other parties, and independents from voting on the Democratic Party ballot." J.S. App. A at 27a. Because, the court asserted, the primary election statute permits voting in only one party's primary, it furthers the objective of Rule 2A as effectively as the Party's rule. The statute, it said, therefore imposes no burden on the Party's protected interests. The court also said that, even if a burden exists, Wisconsin has a compelling interest in enforcing its statute. J.S. App. A at 36a, 42a.

The Attorney General of Wisconsin indicated that he would seek to enjoin the Democratic Party from implementing measures to select delegates in compliance with Rule 2A. *Wisconsin High Court Rules, Wis. State J.*, January 20, 1980, at 1, col. 1; 2, col. 5. Wisconsin held its

primary on April 1, 1980, in the manner specified by the election statute. Subsequently, the Wisconsin state party chose delegates to the 1980 Democratic National Convention in compliance with the Wisconsin court's order.

On July 20, 1980, the Credentials Committee of the 1980 Democratic National Convention decided to seat the delegates from Wisconsin, despite the fact they were selected in a manner which violated Rule 2A. Although the Committee recognized that this Court's stay left it free to refuse to seat those delegates, it decided—at that late date and in the absence of a challenge—to seat the Wisconsin delegates at the 1980 Convention.[12]

SUMMARY OF ARGUMENT

(1) First and Fourteenth Amendment protection against state infringement of associational rights applies with special force where political parties are selecting

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[12] The passage of the 1980 Convention and the Wisconsin delegates' participation do not moot this case. The burdens which Wisconsin's open primary law places on the Democratic Party's associational activity will persist as long as Wisconsin maintains its present statute. As noted, the Party's Charter requires that participation in the nomination processes be limited to Democrats. Thus, the coercion on the party by the open primary statute "remains and controls future elections." *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). Moreover, the time required for full litigation of the issues will be far too short to allow a full judicial resolution prior to the next Convention, if the litigation begins anew in 1983 or 1984 only after delegate selection plans are submitted and rejected. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). The problem, therefore, falls within a class of cases or controversies "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972).

their candidates. A party's candidate selection process represents an organized attempt of like-minded individuals to shape the policies, programs, and personnel of the government itself. Moreover, when choosing candidates, political parties make decisions reconciling the varied interests of their adherents. These decisions reflect political judgments and compromises that are easily distorted by government intrusion.

The order of the Wisconsin court and the statute interfere directly with the Democratic Party's candidate selection process, in violation of the First and Fourteenth Amendments. The Wisconsin court's order would force the National Democratic Party to accept the participation of Republicans and other non-Democrats in selecting its candidates. It would preclude the Party from adopting procedures it believes are necessary to assure that only Democrats participate in selecting the Democratic presidential nominee. It would also interfere directly with the ability of the Party and its Convention to establish and pass on the qualifications of delegates.

(2) This Court's decision in *Cousins v. Wigoda*, 419 U.S. 477 (1975), is dispositive here. In *Cousins*, this Court held that state interests virtually identical to those asserted by Wisconsin could not be sufficiently compelling to justify interfering with a political party's nominee selection process. The national conventions, the Court emphasized in *Cousins*, not the states, have ultimate authority for selecting the parties' presidential nominees. If qualifications for delegates to national party nominating conventions could be imposed by state law, then each of the 50 states could establish delegate qualifications wholly without regard to party policy—a result this Court found would be intolerable. *Id.* at 490.

The Wisconsin Supreme Court's opinion offers no meaningful distinctions of *Cousins v. Wigoda*. As in

Cousins, state interference with a party's selection of its presidential candidate is the crucial issue here. If this case differs from *Cousins*, it is only because the Wisconsin court's order constitutes a more severe infringement on the party's rights. In *Cousins* the Illinois court had enjoined delegates from participating in the Convention. In the order on appeal, the Wisconsin court effectively ordered the National Democratic Party and its Convention to seat delegates chosen in violation of the Party's rules. All nine Justices in *Cousins* agreed that an order affirmatively forcing the party to seat delegates against the Convention's will would be unconstitutional.

(3) The Wisconsin court's suggestion that the state's open primary law imposes no burden on the Party's exercise of its rights misconceives the function of the Party's rule and ignores the historic operation of the law. The Wisconsin Supreme Court tried to avoid the effect of *Cousins v. Wigoda* by asserting that the statutory procedures, which permit an individual to vote in only one party's primary, require affiliation. The only difference, the court says, is that the affiliation is private rather than public as Rule 2A requires.

Contrary to the court's assertion, however, the open primary statute does not limit voting in the Democratic primary to Democrats. The essence of an open primary is that it permits crossover voting. The statute on its face allows crossover voting. In fact, Republicans, independents, and other non-Democrats have voted for years in the Wisconsin Democratic primary. A quantitative study relied upon by the Party's Winograd Commission, which recommended strengthening Rule 2A, showed that (a) crossovers participated in Wisconsin Democratic primaries in 1964, 1968, and 1972; (b) crossovers' presidential candidate preferences were different from those who identified themselves as Democrats; and (c) the crossover vote would alter the composition of the Wisconsin delegation of the

national convention. Additionally, Wisconsin's Attorney General recognized the actual operation of the statute and contended that it intentionally allows crossover voting. The premise of the Wisconsin court's theory—that the statute does not burden the Party's exercise of its rights —has no foundation in the statute, its actual operation, or the Party's experience.

Moreover, Rule 2A establishes a standard for participation that the court's order abrogates. The Party allows only publicly declared Democrats to participate in its candidate selection processes. The statute and the Wisconsin court's order would preclude the party from enforcing that standard. That fact alone constitutes a substantial infringement on the Party's exercise of associational rights. While there may be various ways for a political party to govern itself, the party's choice of means has the protection of the Constitution. The essence of First and Fourteenth Amendment rights is that a state not be able to impose a contrary judgment about those choices on a political party. *Healy v. James*, 408 U.S. 169 (1972). The burden imposed by the statute and the Wisconsin court's order is palpable and severe.

(4) Wisconsin has no interest sufficiently compelling to justify the burden the statute places on the Party's ability to determine the qualifications of delegates to its own Convention. The Wisconsin court had no basis for the assertion that there is wider participation in an open primary than in a primary limited to publicly affiliated voters. It had no evidence of voter harassment in the numerous states (such as New York) where state statutes require affiliation through registration on public rolls as a condition for voting in the primary. Further, the Wisconsin court's claim that the open primary statute preserves its citizens' "fundamental right to vote" in the presidential primary assumes erroneously that Republicans and

other non-Democrats have a "right" to influence the choice of the Democratic candidate.

(5) Finally, even if any of the interests listed by the Wisconsin court were sufficiently compelling, the Wisconsin open primary statute fails to employ the least restrictive means available to achieve the State's goals.

ARGUMENT

I. UNDER THE FIRST AND FOURTEENTH AMENDMENTS, *COUSINS v. WIGODA*, AND NUMEROUS OTHER DECISIONS OF THIS COURT, THE STATE OF WISCONSIN MAY NOT FORCE THE NATIONAL DEMOCRATIC PARTY TO PERMIT OTHER THAN PUBLICLY DECLARED DEMOCRATS TO PARTICIPATE IN SELECTING ITS PRESIDENTIAL NOMINEE OR OTHERWISE TO ABANDON ITS RULES FOR SELECTING DELEGATES TO THE NATIONAL CONVENTION.

A. The Wisconsin Court's Judgment Unconstitutionally Interferes With The Party's Processes For Selecting Its Presidential Candidate.

The National Democratic Party and its adherents enjoy a fundamental right of free political association protected by the First and Fourteenth Amendments to the Constitution of the United States of America. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). As this Court has reiterated many times, associational activity for political purposes lies at the "core

of our electoral process and of the First Amendment freedoms." *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

First and Fourteenth Amendment protection against state interference in political activity takes on even greater importance in the context of political parties selecting their candidates. For it is principally through election of their candidates that associations of like-minded individuals seek to shape the policies, programs, and personnel of the government itself. Protection of the candidate selection process from state intrusion is crucial in a free society, because it is the means by which the Party attempts to implement its adherents' views through the control of government. *See Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

Moreover, the process of winnowing out contenders to select the Party's candidate is particularly susceptible to distortion by state intrusion. The decisions parties make in accommodating the varied interests of their adherents and in trying to achieve their goals reflect subtle political judgments and delicate balances of competing views. A state law which interferes with the freedom of a national political party to establish delegate selection rules and of its convention to pass on the credentials of its delegates is "as direct and severe an infringement of the right of association as can be conceived." *Cousins v. Wigoda*, 419 U.S. 477, 491-92 (1975) (Rehnquist, J., concurring).

The First and Fourteenth Amendments to the Constitution and this Court's decision in *Cousins v. Wigoda* thus bar the State of Wisconsin from forcing the Democratic Party to accept the influence of Republicans and other crossovers in selecting its presidential nominee. Under settled constitutional doctrine, a state may interfere with the Party's exercise of its associational rights only where a compelling state interest justifies the in-

fringement. In *Cousins*, which Appellants believe is dispositive here, this Court held that a state's interest—one very similar to the interest asserted by Wisconsin here—could not be sufficiently compelling to justify so serious an infringement on the Party's First and Fourteenth Amendment rights.

B. This Court's Decision In *Cousins v. Wigoda* Is Dispositive.

In *Cousins*, this Court reversed the decision of an Illinois state court enjoining the seating of delegates selected in accordance with Party rules, rather than those selected in the Illinois primary election under state law. In the 1972 Illinois primary, the voters of Cook County elected a slate of delegates to the 1972 Convention which had been selected under procedures violating the Party's slatemaking guidelines.[13] The Party's Credentials Committee refused to seat the elected delegates and replaced them with a delegation chosen in post-primary caucuses that complied with the Party's rules. Shortly before the opening of the Convention, the Illinois Appellate Court affirmed an order of the Circuit Court of Cook County enjoining the delegates chosen in the caucuses from sitting as delegates to the Convention. 419 U.S. at 478-84. The Illinois court reasoned that "the effective right to participate in primaries is superior to whatever other interest the party itself might wish to protect." *Wigoda v. Cousins*, 14 Ill. App. 3d 460, 477, 302 N.W.2d 614, 629 (1973).

This Court reversed, holding that Illinois' interest in protecting the integrity of its electoral process could not

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[13] Under the Party's rules, state parties presenting slates to caucuses, conventions, or primary voters had to adopt rules which assured that the processes for selecting the slates were fair and open.

be sufficiently compelling to justify so serious an infringement on the Party's conduct of its candidate selection process. The state's interest, "the protection of votes cast at the primary from the impairment that would result from stripping the respondents of their elected-delegate status," 419 U.S. at 488, was insufficient to justify the injunction's infringement on First Amendment rights. *Id.* at 491.

The Court also said that the state's interest could not be sufficiently compelling to justify so serious an infringement on the Party's conduct of the process of choosing its national candidates: "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." *Id.* at 489-90 (footnote omitted). The national conventions, not the states, have the ultimate authority for that task. Noting the danger of permitting each of the fifty states to impose its own views as to what a party's delegate selection process should be, the Court said:

> If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law "each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result." *Wigoda v. Cousins*, 342 F. Supp. 82, 86 (N.D. Ill. 1972).

Id. at 490.[14]

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[14] As noted in Appellants' Jurisdictional Statement at 8 n.9, conflict between Rule 2A and state primary election laws spawned litigation under Montana and Michigan statutes. *Jordan v. Democratic Party of the United States of America*, No. 80-

(*footnote continues*)

The *Cousins* holding applies with special force here, because of the severity of the infringement on the Party's rights. Political parties must be able to protect themselves "from intrusion by those with adverse political principles." *Ray v. Blair*, 343 U.S. 214, 221-22 (1952).[15] In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), this Court upheld the constitutionality of New York's party enrollment requirement for primary voters. The court of appeals, whose decision this Court affirmed, recognized that "the efficacy of the party system in the democratic process — its usefulness in providing a unity of divergent factions in an alliance for power — would be seriously impaired were members of one party entitled to interfere and participate in the opposite party's affairs." *Rosario v. Rockefeller*, 458 F.2d 649, 652 (2d. Cir. 1972), *aff'd*, 410 U.S. 752 (1973). *See Kusper v. Pontikes*, 414 U.S. 51 (1973).[16]

(*footnote continued*)
0617 (D.D.C., filed Mar. 10, 1980); *Ferency v. Austin*, No. G80-193ca(5) (W.D. Mich., filed Mar. 27, 1980). The complaint in *Jordan* was recently dismissed without prejudice. The decision of the district court in *Ferency*, holding that the Michigan statute cannot be enforced against the Party, is presently on appeal to the U.S. Court of Appeals for the Sixth Circuit.

[15] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." L. Tribe, *American Constitutional Law* 791 (1978) (footnote omitted).

[16] Although *Rosario* dealt with "raiding," it applies with full force to measures designed to protect against crossover voting where raiding is not the only concern. The Party's efficacy as a political organization is impaired both by raiding and by crossover voting. The injury suffered by the Party is little affected by the motive of the non-Democratic voter. In both cases the injury results because both the raider and the crossover vote differently than rank and file Democrats. *See* discussion *infra* at 30-31.

C. The Wisconsin Supreme Court's Opinion Fails To Offer Any Meaningful Distinction Of *Cousins v. Wigoda.*

The Wisconsin Supreme Court tried to distinguish *Cousins* on the ground that this case allegedly "does not arise 'in the context of the selection of delegations to the National Party Convention' or in the context of determining 'intraparty disputes as to which delegates [should] be seated'." J.S. App. A at 42a. The statement totally ignores the Wisconsin court's own order, which would have precluded the Convention from disqualifying certain delegates absent this Court's stay.

Delegate qualifications are directly involved. The procedures for determining which candidates the delegates are bound to support are crucial to the delegates' qualifications under the Party's rules. The rules on delegate qualifications require that delegates be bound to vote for candidates at the Convention by processes in which only publicly affiliated Democrats participated.[17] The rules apply only to processes that bind delegates to vote for particular candidates, because their purpose is to establish procedures for selecting the Party's candidate. If the rules controlled nothing more than the selection of delegates bound to cast votes predetermined by another process, they would hardly be worth litigating.

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[17] The "Qualifications of State Delegations" established in the Call explicitly incorporate the Delegate Selection Rules, which provide that (1) a primary that binds delegates to the preferences of the primary voters is a part of the delegate selection process, (2) only publicly declared Democrats may participate in the process, and (3) the preferences of the Democrats participating must be fairly reflected in delegate strength. Democratic National Committee, Final Call for the 1980 Democratic National Convention at 3-9 (May 25, 1979), Exhibit 7 [Rec. 205]; and Delegate Selection Rules for the 1980 Democratic National Convention, Rules 2 and 12.

Cousins also involved the Party's processes for selecting delegates who were bound to vote for particular candidates. Under the Illinois statute, delegates were committed to supporting particular candidates; the primary voters expressed their candidate preferences by voting for committed delegates. Ill. Rev. Stat. ch. 46, § 7-11 (1975). The Wisconsin open primary similarly determines the candidates whom the delegates must support, even though voters do not elect the delegates themselves. State interference with the procedures for selecting the Party's presidential candidate was the crucial issue in *Cousins* and is the crucial issue here.[18]

If this case differs from *Cousins*, it is only because the Wisconsin court's order is more intrusive than the Illinois court order at issue there. The Illinois court had enjoined the delegates from participation in the Convention. The Wisconsin court effectively ordered the Democratic Convention to seat delegates chosen in violation of the Party's rules. All nine Justices in *Cousins* agreed that a state could not constitutionally compel the convention to seat delegates against its will. *See* 419 U.S. at 488; *id.* at 492 (Rehnquist, J., concurring); *id.* at 496 (Powell, J., concurring in part and dissenting in part).

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[18] In fact, the controversy over whether to seat the Cousins or Wigoda delegates bore directly upon the outcome of the Party's selection of its presidential candidate. *See* Note, *Presidential Nominating Conventions: Party Rules, State Law, and the Constitution*, 62 Geo. L.J. 1621, 1629 n.36 (1974). The dispute there also would have meant little if candidate selection were not involved.

II. CONTRARY TO THE WISCONSIN COURT'S OPINION, THE OPEN PRIMARY LAW IMPOSES A SUBSTANTIAL BURDEN ON THE NATIONAL DEMOCRATIC PARTY'S EXERCISE OF ITS FIRST AND FOURTEENTH AMENDMENT RIGHTS.

The Wisconsin Supreme Court tried to avoid the effect of *Cousins v. Wigoda* by concluding that the open primary law does not impose a significant burden on the National Party's rights. It found that the statute imposed no burden on the Party because, it said, the statutory procedures screen out nonadherents as effectively as Rule 2A. J.S. App. A at 27a. It also found no reason to believe that crossover voting by Republicans, independents, and other nonadherents would impair the Party's processes for picking its candidates and conducting its affairs. The Wisconsin court not only misconceived the function of Rule 2A; its factual assertions are incorrect.

A. The Open Primary Law Abridges The Party's Standard For Participation In Its Candidate Selection Processes.

Rule 2A establishes a standard for participation in the process of selecting delegates to the 1980 Democratic National Convention. Only those willing to affiliate publicly with the Party may influence the Party's choice of its candidates and the other decisions before the Convention. Wisconsin's primary election statute precludes the National Democratic Party from enforcing Rule 2A.

The Wisconsin court tried to portray the open primary law as being equally as effective as Rule 2A in limiting participation in the nominating process to Democrats. Because the primary voter must vote on only one party's ballot, he or she effectively makes a declaration of affiliation with the Democratic Party for purposes of the primary, albeit an undisclosed one, the court said. Yet,

characterizing an "open primary" as one which limits voting in the Democratic primary to Democrats, as the court did, is a patently false premise. The essence of an open primary is that individuals vote in any party primary, regardless of party affiliation or avowed independence.

But, even if one could reasonably characterize Wisconsin's statute as providing for a "Democrats only" primary, it nonetheless still prevents the Democratic Party from allowing only publicly declared Democrats to participate in selecting the Party's candidates. In Rule 2A, the Party has made a conscious choice (based on experience with weaker rules) to use public affiliation to help limit participation in its candidate selection process to those who share the Party's political values and desires for political success. The rule screens out those whose affiliation is so slight, tenuous, or fleeting that they refuse to stand up and be counted.[19] Indeed, state statutes

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[19] The rule not only tries to ensure that the outcome of the process is not distorted by nonadherents, but also to build a more responsible party. An essential attribute of an effective party is that its adherents share a commitment to a network of overlapping and sometimes conflicting goals. This shared commitment is a party's essential impetus toward consensus and stability. D. Ippolito & T. Walker, *Political Parties, Interest Groups and Public Policy: Group Influence in American Politics* 4-5 (1980); F. Sorauf, *Party Politics in America* 13-14, 15-17 (1980); H. Bone, *American Politics and the Party System* 11-16 (1971).

As one commentator has said:

> [I]t is impossible to develop party responsibility if nominations may be controlled by those with no continuing allegiance to the party.... The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.

Committee on Political Parties, *Toward a More Responsible Two Party System*, 64 Am. Pol. Sci. Rev. 1, 71-72 (Supp. No. 3, pt. 2) (1950) (emphasis omitted).

requiring public party enrollment for voting in primaries serve the same objectives. *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973).

Thus, even if the Wisconsin court's view that the open primary statute actually requires affiliation to vote in a party's primary were plausible, the state would still be unconstitutionally substituting its own judgment for the Party's as to the standard for participation in selecting its candidate. An essential element of a political party's First and Fourteenth Amendment rights must include the freedom to organize and direct the party so as to be effective in fostering its goals. *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). Time after time the courts have sustained a party's right to regulate its internal affairs regarding membership, affiliation, and representation in party decisionmaking. *E.g., Cousins v. Wigoda*, 419 U.S. 477 (1975); *Ray v. Blair*, 343 U.S. 214 (1952); *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 585; *Irish v. Democratic-Farmer-Labor Party of Minnesota*, 399 F.2d 119 (8th Cir. 1968).

As noted, the decisions parties make in conducting their affairs often reflect complex and subtle political judgments. There are virtually no standards by which legislatures or judges can determine with certainty the political effectiveness of a particular choice of means to achieve a concededly valid objective. There may be room for disagreement, but "a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution. . . ." *Ripon Society, Inc. v. National Republican Party*, 525 F.2d at 585 (emphasis in original). As the court said in *Ripon*, "[i]t is the essence of the First Amendment rights, which the parties exercise, that they may make their own

contrary (and rational) judgments without interference from the courts." *Id.* at 588.

This Court has repeatedly stated that the exercise of First Amendment rights may not be abridged merely because there may be other means of exercising those rights. In *Spence v. Washington*, 418 U.S. 405 (1974), the state supreme court had found "the inhibition on the appellant's freedom of expression 'miniscule and trifling' because there [were] 'thousands of other means available to [him] for the dissemination of his personal views." *Id.* at 411 n.4 (citation omitted). This Court rejected that view summarily, observing that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)). *Accord, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976); *Healy v. James*, 408 U.S. 169 (1972).

B. Even If The State Could Substitute Its Judgment For The Party's, The Wisconsin Court Erred In Concluding That The Open Primary Law And Rule 2A Are Equally Effective In Precluding Non-Democrats From Influencing Selection Of The Democratic Candidate.

Even if it were proper for the Wisconsin Supreme Court to assess the relative effectiveness of the open primary law and Rule 2A in screening out non-Democrats, the court had no support for the finding that both limit participation equally as well. The parties submitted the case on stipulated facts that did not address that question at all. While the Wisconsin court tried to build a case from extra-record secondary sources, the secondary materials are in conflict, at least, and probably to the contrary.

A major quantitative study, relied on by the Winograd Commission, proved what most knew anyway: Republicans and other non-Democrats have "crossed over" to vote heavily in the Wisconsin Democratic primary for years. They also have a significant impact on the apportionment of the Wisconsin delegation's votes for candidates. Adamany, *Cross-Over Voting and the Democratic Party's Reform Rules*, 70 Am. Pol. Sci. Rev. 536, 540 (1976).

In 1964, crossovers made up 26% of the participants in the Wisconsin Democratic primary. In that primary, 7% of the Democratic identifiers voted for Governor Wallace, but 62% of the crossovers voted for him. Three-quarters of Governor Wallace's support in the Democratic primary came from crossover voters. *Id.* The distribution of the preferences of those who identified themselves as Democrats and crossovers were obviously quite different.

In 1968 crossovers made up 28% of the participants in the Democratic primary. Forty-eight percent of the Democratic identifiers voted for Senator McCarthy, while 39% voted for President Johnson. Of the crossovers, however, 70% voted for Senator McCarthy, while only 14% voted for President Johnson. Participation of crossovers increased by 2 1/2 times Senator McCarthy's margin of victory over President Johnson in Wisconsin. *Id.* at 539.

In 1972, crossovers made up 34% of the participants. Fifty-one percent of the Democratic identifiers voted for Senator McGovern while only 7% voted for Governor Wallace. Of the crossovers, however, only 33% voted for Senator McGovern, while 29% voted for Governor Wallace. The study figures indicate that two-thirds of Governor Wallace's support in the Democratic primary came from crossover voters. *Id.* The study found that "the participation of crossover voters will . . . alter the composition of national convention delegations." *Id.* at 540. As the

Winograd Commission concluded, crossovers distort the results of the process.

Late in its opinion the Wisconsin court acknowledged the well-known fact that Republicans and independents have voted in Wisconsin Democratic primaries. J.S. App. A at 25a. The Wisconsin court did not deny that the primary statute permits Republicans and non-Democrats to vote in the Democratic primary; nothing in the statute itself actually prohibits crossovers. The Wisconsin court's allusion to a statement of legislative intent is not to the contrary.[20] The generalized statement of legislative intent has never prevented Republicans from voting in the Democratic primary or vice versa.

Finally, Wisconsin's Attorney General took a more realistic view of the operation of the statute. He argued below that the state statute intentionally permits Republicans and other non-Democrats to participate in selecting the Democratic nominee. He contended that failure to uphold the open primary law over Rule 2A would frustrate the statute's policy of permitting any person to vote in any party's primary regardless of party allegiance. Memorandum in Support of Petition for Leave to Commence Original Action [Rec. 8] at 3. In the State's brief to the Wisconsin court he said that the statute encourages the exercise of the "associational freedoms" of independents and Republicans who wish to vote in the Democratic primary in a particular year. Brief and Appendix of Petitioner, J. App. at 80.

In sum, the Wisconsin Attorney General's view of the statute's intention, the court's recognition of its oper-

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[20] The Wisconsin court asserts that the "legislature has established the presidential preference primary to provide the opportunity for 'the voters of this state . . . to express their preference for the person to be the presidential candidate *of their party.*' Sec. 8.12(1) Stats." J.S. App. A at 23a (emphasis the court's).

ation, and the study data are all consistent. The open primary law precludes the National Party from allowing only Democrats to participate in its candidate selection process. It constitutes a severe infringement on the Party's exercise of its rights, one that strikes at the core of freedom to associate in a political context.

III. WISCONSIN HAS NO COMPELLING INTEREST THAT JUSTIFIES THE BURDEN UPON THE PARTY'S ABILITY TO ESTABLISH AND PASS UPON THE QUALIFICATIONS OF ITS CONVENTION DELEGATES.

The Wisconsin court concluded that, even if the statute imposed a substantial burden on the Party, the state has a compelling interest in maintaining an open primary. That interest, it says, is "to preserve the overall integrity of the electoral process by providing secrecy of the ballot, thereby encouraging increased voter participation and ensuring that the primary . . . [is] conducted in a fair and orderly manner." J.S. App. A at 30a. Yet, this Court held directly to the contrary in *Cousins*. A state's interest "in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention . . . . '[T]he convention itself [was] the proper forum for determining intraparty disputes as to which delegates [should] be seated.'" 419 U.S. at 491 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4 (1972)). *Cousins* by itself should have been dispositive below on the compelling state interest issue.

The Wisconsin court also tried to identify several elements of the State's interest in "preserving the integrity of its electoral processes." They were: encouraging voter participation; protecting voters' "privacy of associ-

ation," which avoids harassment of voters on account of their political affiliations; and protecting the "right to vote" in the Democratic presidential primary. J.S. App. A at 30a-32a.

(1) Specifically, the court asserted that participation may be reduced by the required declaration of affiliation. Without a record on the question, however, there is no basis for the assertion that there is in fact wider participation in an open primary, as opposed to a primary limited to publicly affiliated voters. Indeed, "turnout rates [are] higher in closed-primary states than in open-primary states." D. Ippolito & T. Walker, *Political Parties, Interest Groups, and Public Policy: Group Influence in American Politics* 195 (1980); *accord*, A. Ranney, *Participation in American Presidential Nominations, 1976* 27-29 (1977).

(2) The Wisconsin court also cites no evidence of voter harassment either in Wisconsin or in the numerous states where state statutes require affiliation through registration on public rolls. *See Nader v. Schaffer*, 417 F. Supp. 837, 844 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976). The state's bare assertion of an interest is insufficient to justify its infringement of the Party's First Amendment rights under the strict standard of scrutiny applicable here.

(3) Finally, the Wisconsin court cited cases purportedly supporting its claim that the open primary statute preserves its citizens' "fundamental right to vote" in the presidential primary. J.S. App. A at 33a-35a. That assumes erroneously that Republicans and other non-Democrats have a "right" to influence the choice of the Democratic candidate. In any event, the respondents in *Cousins* relied upon the same cases. *See* Brief for Respondents at 25-31, *Cousins v. Wigoda*, 419 U.S. 477 (1975). This Court said in response:

> Consideration of the special function of delegates to such a [national party nominating]

> Convention militates persuasively against the conclusion that the asserted interest constitutes a compelling state interest.

419 U.S. at 489. *See Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 588 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976).

IV. EVEN IF ONE OF THE INTERESTS LISTED BY THE COURT WERE SUFFICIENTLY COMPELLING, THE WISCONSIN OPEN PRIMARY STATUTE FAILS TO EMPLOY THE LEAST RESTRICTIVE MEANS AVAILABLE TO ACHIEVE THOSE GOALS.

Even if the interests asserted by Wisconsin were "compelling," the statute does not use the least restrictive means available for fostering those interests. Where a state burdens fundamental rights, "a heavy burden of justification is on the State" to show that the means chosen to advance its compelling interest are tailored to serve the state's interest and do not unnecessarily burden constitutionally protected activity. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). If less burdensome, but reasonable, means are available, "a State may not choose the way of greater interference." *Id.*

(1) The Wisconsin court asserted that the open primary law "encourages participation"; although, as noted, it had no evidence that a requirement of public party affiliation discourages participation. In any event, the State could use less restrictive means to encourage participation. For example, it could promote participation by educating voters or by improving the accessibility and convenience of polling places.

(2) The open primary statute, the Wisconsin court said, protects voters from political harassment. But the State has plenary power to impose civil and criminal

penalties for political harassment. None of the alternative means available to Wisconsin to deal with harassment would interfere with the Democratic Party's right to define those who may influence its nominating processes.

(3) Wisconsin's assertion that the open primary law protects its citizens' "right to vote" ignores the fact that a closed primary statute would also confer a right to vote, but without infringing upon the Party's rights. A declaration of affiliation raises no obstacle to exercising the franchise.

Despite this array of less drastic alternatives, the Wisconsin court concludes that the law "is drawn with the 'precision' required to pass constitutional tests." J.S. App. A at 32a. The Wisconsin court asserted that "[r]ecognizing that a private declaration of party preference rather than a public-recorded one might tempt some to cross over, the legislature has taken measures to reduce the temptation and to protect the party's associational interests." *Id.* But, the opinion fails to identify any such measures, other than the fact that the ballot procedures permit voting for only one party's candidates. The opinion nowhere explains how the statutory procedure prevents nonadherents from voting in the Democratic primary. Indeed the statute does not prevent crossover voting—as shown by the Wisconsin court's own concession on the point, the Adamany study, the Wisconsin Attorney General's position below, and the Party's historic experience.

In sum, Wisconsin has failed to demonstrate either a compelling interest in overriding the Party's exercise of its associational rights or the unavailability of less drastic means to advance whatever interest it may have. Under *Cousins v. Wigoda* and traditional First Amendment tests, Wisconsin's interest in the open primary statute must yield to the Democratic Party's vital right to freedom of political association.

CONCLUSION

For 12 years, the National Democratic Party has made prodigious efforts to ensure that its nominating processes are open to fully effective participation by all Democratic voters. It has adopted rules to guarantee that formerly underrepresented groups—blacks, other minorities, women, and youth—have a fair opportunity to participate. As a corollary, it seeks to assure that the expanded opportunities to influence selection of the Party's presidential candidate are neither diluted nor distorted by participation of Republicans, independents, and other non-Democrats. The Party has continually strengthened its rules on who may participate based on unsatisfactory experience. The rule and its objectives lie in the "core area" of protected associational activity. The Wisconsin Supreme Court's order would infringe severely on the Democratic Party's effort to conduct its affairs, setting reform efforts back at least 12 years.

WHEREFORE, the National Democratic Party respectfully requests this Court to reverse the order of the Wisconsin Supreme Court on appeal.

Respectfully submitted,

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